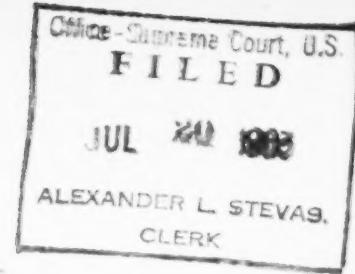


NUMBER 82-2005



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

WILLIAM MARK WATKINS, Appellant,

v.

W. P. ROCHE, JR., Appellee.

ON APPEAL FROM
THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

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July 18, 1983

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Appellee moves the Court to dismiss the appeal in
the above case on the following grounds:

I.

The federal question presented by Appellant was
not properly raised in the Georgia state courts in that
Appellant improperly sought to attack the constitutionality
of the statutes in question by means of declaratory

judgment which was inappropriate under Georgia law.

II.

Because Appellant did not raise the constitutional issues by a proper procedure neither the trial court nor the Supreme Court of Georgia considered or passed upon the merits of Appellant's constitutional attack.

III.

Appellant brought suit against Appellee alleging negligence, ie. medical malpractice. The constitutional issues raised by Appellant were neither relevant nor controlling as to the issue of Appellee's liability. Therefore, the appeal does not present a substantial federal question and the state court judgment rests on an adequate non-federal basis.

ARGUMENT AND CITATION OF AUTHORITIES

I.

THE CONSTITUTIONAL ISSUES WERE NOT PROPERLY RAISED AND THE GEORGIA COURTS PROPERLY FAILED TO PASS UPON THE MERITS THEREOF.

Appellant originally filed suit against Appellee seeking to recover damages for alleged medical malpractice. (See Statement of Jurisdiction, p. 12) At that time Appellant did not in any way attack the constitutionality of Ga. Code Ann. §§88-404.2 and 88-504.2 (now O.C.G.A. §§37-7-41 and 37-3-41, respectively). In an amended complaint Appellant sought to obtain a declaratory judgment from the court that these statutes were unconstitutional. It is undisputed that all the rights of both Appellant and Appellee had accrued under the facts and circumstances of this case. Appellant was not and is not being threatened by Appellee or by any other person with possible future involuntary detention pursuant to the statutes in question. It is well established in Georgia law that where the rights of the parties have accrued,

declaratory relief is improper. Pinkard v. Mendel, 216 Ga. 487, 117 S.E. 2d 336 (1960); Brogdon v. State Board of Veterinary Medicine, 244 Ga. 780, 262 S.E. 2d 56 (1979); Sapp v. A.B.C. Credit Investment Company, 243 Ga. 151, 253 S.E. 2d 82 (1979).

In Pinkard v. Mendel, 216 Ga. 487(2) the Supreme Court of Georgia held:

And where, as here, the petition shows that the rights of the parties have already accrued and no facts or circumstances are alleged which show that an adjudication of the plaintiffs' rights is necessary in order to relieve the plaintiff from the risk of taking any future undirected action incident to their rights, which action without direction would jeopardize their interest, the petition fails to state a cause of action for declaratory judgment.

As evidenced by the order of the Georgia trial court, the trial court failed to consider and rule upon the constitutional issues raised in the Appellant's amended petition for a declaratory judgment because such relief

was improper and unavailable under Georgia law. (See Statement of Jurisdiction, Appendix, p. 1a) On Appeal the Supreme Court of Georgia affirmed the trial court's ruling without an opinion, pursuant to its Rule 59. As set out at page 8, Statement of Jurisdiction, Rule 59 authorizes an affirmation without an opinion if: "(1) The evidence supports the judgments; (2) No error of law appears and an opinion would have no precedential value; (3) The judgment of the court below adequately explains the decision." In essence the Supreme Court of Georgia found no error in the trial court's refusal to pass upon Appellant's request for a declaratory judgment with regard to the constitutionality of the statutes attacked and adopted the trial court's ruling in this regard. Appellant having failed to properly raise the constitutional issues so as to require a ruling by the Georgia state courts, this Court should deny jurisdiction of this appeal.

II.

THE CONSTITUTIONAL ISSUES RAISED BY APPELLANT WERE NEITHER RELEVANT NOR CONTROLLING TO THE DECISION BELOW AND DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In defending against Appellant's allegations of negligence, Appellee asserted a "good faith" defense provided for by statute, Ga. Code Ann. §§88-402.23 and 88-502.23 (now O.C.G.A. §§37-7-5 and 37-3-4, respectively). Appellant seeks to defeat Appellee's good faith defense by having the Court declare unconstitutional the statutes authorizing the plaintiff's detention and transfer to an emergency receiving facility, Ga. Code Ann. §§88-404.2 and 504.2. This cannot be done.

In amending Chapter 88-4 and 5 of the Georgia Health Code the Georgia legislature (1978 Georgia Laws 1856, at 1893 and 1978 Georgia Laws 1789, at 1825, respectively) specifically provided:

In the event any Section, subsection, sentence, clause or phrase of this Act shall be declared or

adjudged invalid or unconstitutional, such adjudication shall in no manner effect the other sections, subsections, sentences, clauses or phrases of this act, which shall remain a full force and effect, as if the Section, subsection, sentence, clause or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof.

The General Assembly hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional.

Appellant has not attacked the constitutionality of the good faith defense granted to Appellee in Ga. Code Ann. §§88-402.23 and 88-502.23. Regardless of the merits of Appellant's constitutional argument as to other statutes, Appellee's statutory good faith defense would still be viable. Appellant's constitutional contentions have absolutely no relevancy to the validity of Appellee's good faith defense. It is neither necessary nor relevant to the issues in the present case for the Court to consider the constitu-

tional issues raised by Appellant and the Georgia courts properly refused to do so.

CONCLUSION

For the reasons discussed above, the Court should dismiss the appeal of this case.

Respectfully submitted,

Wilson R. Smith

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AFFIDAVIT OF MAILING

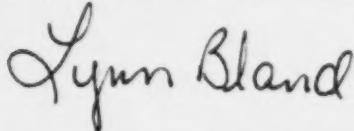
I, the undersigned, do hereby certify that on the 18th day of July, 1983 I personally deposited in the United States Post Office, Vidalia, Georgia, forty copies of the within and foregoing Motion to Dismiss with adequate pre-paid first-class postage and properly addressed to the Clerk, United States Supreme Court, United States Supreme Court Building, Washington, DC 20543.

This 18th day of July, 1983.



Wilson R. Smith, Counsel of
Record for W. P. Roche, Jr.,
Appellee

Sworn to and subscribed before me
this 18th day of July, 1983.



NOTARY PUBLIC

(SEAL)

CERTIFICATE OF SERVICE

I certify that I have served three (3) copies of the within and foregoing Motion to Dismiss on Stephen E. Shepard, Attorney for William Mark Watkins, Appellant, at 418 Greene Street, Augusta, Georgia 30901, by depositing the same in the United States Mail, properly addressed, with first class postage prepaid.

This 18th day of July, 1983.



Wilson R. Smith
Wilson R. Smith, Counsel of
Record for W. P. Roche, Jr.,
Appellee

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